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## CONTENTS

### ARTICLES

- Retrenchment and the Law ..... 1  
LOVEMORE MADHUKU
- Criminal Justice and the Truth in Zimbabwe: A Necessary Introspection? ..... 18  
CHARLES GOREDEMA
- Women, Land and the Constitution ..... 42  
J. E. STEWART
- Judges in the Storm: The Judicial Review Debate ..... 50  
MUNYARADZI GWISAI
- Electoral Law in Zimbabwe ..... 64  
LOVEMORE MADHUKU
- The Judiciary and Democratic Governance in Sub-saharan Africa:  
The Complexities of Regulating Competing Interests ..... 91  
SUFIAN HEMED BUKURURA
- An Appraisal of the Recommendations of the Law Development  
Commission on Misrepresentation in Insurance Law ..... 103  
MICHELE MENEZES
- Amendment of an Indictment: When is it Proper Under Botswana Law? ..... 114  
KABELO KENNETH LEBOTSE
- Towards a Compensatory Approach to Redressing Constitutional  
Violations in Botswana ..... 120  
DUMA GIDEON BOKO

### NOTES AND COMMENTS

- Class War in The Courts? Retrenchment Packages and *Continental  
Fashions (Pvt) Ltd. v. Mupfuriri and Others* ..... 134  
MUNYARADZI GWISAI
- Municipal Law: The Law Regulating Conditions of Service for  
Junior Local Government Employees ..... 144  
ARTHUR MANASE

## WOMEN, LAND AND THE CONSTITUTION<sup>1</sup>

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### INTRODUCTION

In addressing the issue of Women, Land and the Constitution, the discussion shall be broken down into three main components. Firstly, the problems that women experience with access to all forms of resources, but especially land, will be considered. Secondly, the role and function of the constitution and the law of Zimbabwe will be considered. The gap between law and reality will be explored, and finally, an attempt shall be made to suggest some ways forward.

### ADDRESSING THE WHOLE QUESTION

Addressing the land issue in isolation from women's general problems of access to both material and enabling resources masks the problems that women face in Zimbabwe. The wider problem is that women often have little alternative but to look to land as a source of support for themselves and their children, as they have few if any other viable options open to them. Women are also the victims of perennial processes of marginalisation, starting from childhood, from enabling resources such as basic education and skills training. Thus they have fewer independent career options than men which leaves many women with marriage as the only "viable" career to follow. However, this only gives them a tenuous access to resources that are held and controlled by males.

Just as with men, women should not be forced to look to a small allocation of land as the only means to provide an existence. The overall economy needs to be developed so that there are viable alternatives available to the population from which to earn an income. Focusing only on land will not solve the land issue, as the pressure needs to be lifted from the land as the primary source of people's economic sustainability.

### WOMEN'S PROBLEMS IN ACCESSING RESOURCES, ESPECIALLY LAND

Women are routinely cited as constituting 70% of agricultural "person" power in Zimbabwe, but also as having no direct rights in the land themselves. The land is held and controlled by men. Thus women contribute the bulk of the labour, but rarely have a direct legal stake in the land they work. Efforts to encourage women to engage in greater levels of production and to be effective tools in the development process are at risk of being jeopardised when individual women are seen to make significant contributions to family economic progress and generating income but have no secure stake in the land that is the basis for that development. Women are liable to be summarily thrown off the land by the man. A woman may commit suicide when the products of her labour are misapplied or abused by her spouse who controls the land. Such events do not send positive messages to other women to engage in cash crop production and to make significant contributions to the development process.

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1. This paper was originally delivered at the National Constitutional Assembly — Great Indaba on Land and the Constitution on 17 March 1998 in Harare.

Women and Law in Southern Africa (WLSA) research in Zimbabwe has shown that the vast majority of women in the rural areas, regardless of race, access land primarily as wives. In some instances unmarried daughters who are mothers, widowed or divorced daughters and sisters, mothers and grandmothers who are without adequate means for survival may be accommodated on the family land allocation or land holding. But this is seen as a special concession not as a right to land *per se* for women. However, these special cases represent a small minority of women and in general when women have access to land for productive purposes they do so through men, usually husbands [Ncube and Stewart, 1997(a), (b)].

### WOMEN, MEN AND LAND

The importance of women in the allocation of land to men in both communal and resettlement land is a hidden factor that needs to be formally acknowledged and taken into account in the assignment of rights in such land. For example, in communal areas a man's entitlement to land is based on his being married. Thus women are critical to men's accessing land and this is also the case, so it seems, for resettlement allocations. Yet in both resettlement policy and the land allocation processes in communal areas, although women are key in the allocation process the rights in the land are vested in her husband. Thus in these areas women usually lack control over the land they work and develop. Of especial concern to women is that they lack control over the fruits of the productive activities that they carry out on the land. It is this lack of control and intense frustration with her powerlessness that may trigger many harvest suicides.

For women who access land as wives, it seems that the issue of greatest concern to them is not that they do so as wives, or that their contributions go to the general benefit of the family, but rather that they are denied security of their interest in the land and its fruits. They are on the land with only a precarious right of occupation during the existence of the marriage [Ncube and Stewart, 1997(b)]. Women in rural areas who have been interviewed regarding access to resources do not indicate that they wish to access land separately from men but rather that they need to have their contributions recognised and protected. Male public reactions to women and the land question is frequently very defensive as if there is a battle over who is entitled to land as between the sexes. Yet, arguably women want to see formal recognition of their productive partnership with males and security for their contributions to the family welfare.

Women are also forced to take an antagonistic role to the man when the marital relationship breaks down and they wish to obtain a division of the matrimonial resources when a more conciliatory one might be better for both parties and their children. Women should have a right, protected and enshrined in law to an equitable share of the matrimonial and family property, a share that she is guaranteed by the law and does not have to be pursued through legal confrontation.

Arguably if women had a more secure right and entitlement to a share in matrimonial land this could be used as a negotiating chip. It might also force men to consider carefully the stability and preservation of their marriages, in the same way that women must now put effort into ensuring that the marriage is preserved so that they can protect their access to productive resources.

A focus on developing and maintaining relationships was revealed during the WLSA research into the family and women's access to resources as being the focus of women's attention rather than building up a personal financial and equity base [Ncube and Stewart, 1997 (a)]. Elderly women in rural areas who have sons do have a potential for protection from the depredations of widowhood. However, this form of equity can take a very long time to develop and does not reflect the reality of women's contribution to the family (Dengu-Zvobgo *et al*, 1994).

Women also tend, perhaps because of an emphasis on relationships or as a result of the socialisation process of treating men as the farmers, to discount the level of their contribution to farming activities, especially when they do not carry out physical labour on the farm:

What do you do? I am a housewife. Is that all you do, what do you do around the farm? Nothing, I don't deal with the cattle or organise the milking. But . . . ? I do maintain the herd and milk records and I do the farm books. I look after the workers' primary health needs, I do the wages. So you actually do quite a lot of farm related work? Yes, I guess so. I hadn't quite thought of it like that before, I always thought I wasn't a farmer (Discussion with a woman from a "white" commercial farm, Midlands area).<sup>2</sup>

The same disqualification takes place within the gendered thinking of indigenous women who are engaged in farming activities. They underplay the extent and value of their contribution to the farm activities. Such an attitude can mean that many women despite considerable contributions to the development of the farm or family land allocation, often leave without any significant reimbursement for that contribution and with inadequate resources with which to start a new life after divorce or separation. Her skills will have been built around an agricultural base, she rarely has any independent sources of security such as pension or insurance policies to provide for her later years. She can of course make a claim for a share of the matrimonial property, including commercial land but unless she is well advised the extent of her contribution may be treated as minimal.

In both communal and resettlement areas, because of the nature of the tenure the woman, even if she is granted a share of the matrimonial property on divorce, cannot effectively exercise her right against that land as the right of occupation is vested in one individual, the man. If it is commercial land, she is also, in practice, at the whim of the male spouse when it comes to negotiating for a share of the land or its value on the dissolution of the union. Provisions such as those in S7 of the Matrimonial Causes Act, ought in theory to allow the court to take into account the extent of the wife's contribution, but this is almost invariably under-valued when the actual distribution of the matrimonial assets is undertaken [Ncube and Stewart, 1997 (b)].

## WOMEN AND THE RESETTLEMENT PROCESS

One of the statements that is glibly made is that half of all the people who are resettled are women, thus the resettlement exercise is dealing with the needs of women. However, a mere statistical statement on resettlement misses the very problems that women experience

2. My initial description of her was the stereotypical one of "white commercial farmer's wife" which is loaded with gendered nuances and in effect ascribes a secondary no-land related status to her.

over land and the use of their labour on land. The solidity of the family, and the importance of the husband and wife as a productive unit are stressed in the rhetoric around the land question but this is not translated into equitable sharing between marital partners (both for registered and unregistered customary law marriages as well as civil marriages) when land redistribution is undertaken. In a married couple, the resettlement policy favours the man in that the land allocation is made in the name of the husband. Reasons given for this are that if it were to be in the name of the woman this would cause problems for the man; that this is the correct cultural approach. However, it is perfectly feasible for the allocation to be made in the name of both husband and wife; there is no legal barrier to this taking place. It has been noted that even where the wife is the one who contributes the bulk of the skills and the points in securing the allocation of the land, the preference will still be for the land to be formally allocated to the husband.

In the event of a divorce or separation it appears that the wife, even if the reality is that she is the productive farmer, will be the one who is required to move from the land while the husband remains in occupation [Ncube and Stewart, 1997(b)]. Thus precarious as the rights of the resettlement farmer are, because of the tenuous nature of occupation rights and the lack of formal title to the land, they are doubly precarious for his wife.

In some resettlement schemes and communal areas, widows and divorcees are considered as potential applicants for land. However, if there is a man to whom they can be nominally attached the land is allocated to the man, rather than to the woman [Chenaux, 1992; Ncube and Stewart, 1997 (b); Land Commission Report, 1994].

### WOMEN, LAND, LAWS AND THE CONSTITUTION

Technically, it can be argued that perhaps with the exception of a wife's assertion by virtue of her position as a wife to a right to land in her husband's communal areas which is still regulated by customary law and indirectly protected by S23 of the Constitution, discrimination against women in relation to rights to immovable property is outlawed by S23 of the Constitution and more precisely legislated against in relation to commercial land by the Immovable Property (Prevention of Discrimination) Act, Chapter 10:12.

Theoretically women can acquire commercial land, whether urban or rural, agricultural, industrial or residential. However, the reality is that women are not able to acquire land on the same basis as men.<sup>3</sup> Thus women are not a significant number of those who own or control land. Women's situation *vis a vis* land is that the majority of them, in both urban and rural settings, access land through men. Thus although there is only limited legal discrimination against women over land, discrimination is present and institutionalised in favour of men.

Although the law provides that there should be no discrimination against women over ownership of land, in real terms the law does not provide for an equitable share in land for women either within the marital relationship or as individuals in their own right.

3. Of course there are many men who are unable to acquire land in the commercial arena because they lack the necessary collateral to obtain finance. However, women are as a general proposition more marginalised than men in this regard.



Arguably there has been a slight improvement since the passing of the Administration of Estates Amendment Act in which in an intestate succession, regardless of the form of marriage of the parties the surviving spouse is, in effect, given the right of occupation or ownership of the matrimonial home or living space of the wife in the event of a polygynous union. The Act does not deal with any right to a land allocation to accompany the matrimonial home so the actual value of the occupation right in a rural area is somewhat problematic (Stewart and Gwaunza, 1998). Also a share of estate assets may or may not produce a share of the immovable property, ie agricultural land, that the woman needs to sustain herself. As with many of the amendments to the law the solutions appear to be adequate on paper, but in reality do not address women's needs.

The nature of tenure and who it is vested in means that women who contribute the bulk of the work in resettlement and communal areas and on many small scale commercial farms, have no claim during the currency of the marriage to the land which is allocated to the husband. It is only at the dissolution of the union that they can try and assert a claim.

#### THE ROLE AND FUNCTION OF THE CONSTITUTION IN THE LAND QUESTION

Zimbabwe ascribes, at least on paper, to many international human rights instruments. It has signified its acceptance of the Convention on the Elimination of All Discrimination Against Women (CEDAW) although it has not as yet, as prescribed in S111B, taken the steps of formally incorporating the CEDAW into domestic law. There is thus an obligation, despite the legal niceties of non incorporation, to ensure that the provisions of the CEDAW are adhered to thus in terms of Article 14 which seeks to give special attention to the needs and aspirations of rural women:

1. State Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
2. State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure on a basis of equality between men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (g) . . . [to] equal treatment in land and agrarian reforms as well as in land resettlement schemes.

Further, in accordance with Article 16(h) there should be:

The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property . . .

The Constitution is the primary instrument through which such reforms should be signalled and the overall mechanisms for their implementation set out. Thus the role of the constitution as regards land could be described as regulatory and protective as well as a potential source of adjustment of distribution of resources.

Any proposed new constitution for Zimbabwe should facilitate women's equitable access to land whether as a consequence of the land redistribution exercise or as a general economic entitlement.

### TAKING ACTION NOW

The current Zimbabwe Constitution now addresses through the amendments to S23 some of the concerns of women in relation to discrimination. However, it does not go far enough as there are too many savings and escape clauses. Thus in any new constitutional order there should be a sweeping, essentially unqualified, provision that there should be no legal or administrative discrimination based on sex or gender except to the extent of an exception based in differentiation related to the purely biological imperatives of male and female lives. Arguably these are relatively few and related to women's needs around maternity issues. They definitely would not extend to rights to land.

Even without major reforms there is value in looking at what is currently available to women who might want to challenge the current *status quo* at local governance and national administrative levels.

Even at present it should be possible to mount a constitutional challenge to the gendered allocation processes of resettlement land where men are favoured over women as the allottee — this could be couched as a violation of S23(1)(a):

no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

In terms of S23 (2) discriminatory practices now include those based on gender.

Thus the formulation of resettlement policy that does not accord women equal rights with men in the allocation of resettlement land is a violation of women's protection against discrimination by a public office. This is not to say that women and men must have separate allocations of land, but that for married couples the allocation should be joint and recorded in their joint names, which would accord with the CEDAW directives on equitable approaches between the sexes. However, women who seek land in their own right must be treated on an equal footing with male applicants. Section 23(3)(f), provides:

Nothing contained in any law shall be held to be in contravention of s1(a)(see below) to the extent that the law in question relates to any of the following matters:- the according to tribespeople to the exclusion of other persons of rights or privileges relating to Communal Land.

That non-allocation of land to women who are tribespeople connected to a particular communal area is a violation of the non-discrimination provisions in the Constitution. Whether this would be confined to women with a biological link to that group or could include wives being a further question to pursue. However, at the very least it would appear that if a woman from a particular "tribe" who seeks a land allocation in terms of S8 of the Communal Lands Act (Chapter 20:04) is denied such a land allocation because she is a woman, this would be violation of S23.

### THE CONSTITUTION, LAW AND THE REALITY GAP

However tantalizing non-discrimination provisions and the arguments for their extension may seem, the reality is that the vast majority of women are still excluded by social, cultural and economic factors from direct access to and control over land.



Finding the means to acquire commercial land, because of women's lack of collateral remains a major problem. Encouraging women to demand and pursue rights to resettlement can be easily bandied about on the national stage, but women have to be prepared to take up the challenge and endure the litigation and possible social ostracisation engendered by making such a claim.

One of the problems that this posits is that if we wish to improve women's position we have to change the whole social and economic structure which is, to say the least, a monumental task. However, what mapping the law reality gap indicates is that the law is largely in place to deal with women's options; women now need to be armed to exploit those options. It can be argued that the most effective way to accomplish this is not to rail against the male establishment but to get on with the task of improving women's capacity to take up the options that are available. For example, by improving their educational opportunities, improving their skills and giving them a basis to compete equally with men in the general economic realm which would include that of agriculture. However, for the meanwhile, while we are reforming everything, women who wish or need to farm in Zimbabwe are currently condemned to a cycle of "land dependency" on men.

#### THE WAY FORWARD?

If Zimbabwe is to seriously reconsider its constitutional base and framework and within that to seriously address sex and gendered inequities, it must take bold sweeping measures to implement a gender sensitive constitution and abolish the old inequities. The reservations relating to gender have to be removed from S23 of the Constitution so that family law, inheritance issues, customary law and, most importantly, in this context, allocation of communal land are not exempted from challenges based on gender discrimination.

Needless to say these problems cannot be solved by legal approaches and constitutional challenges alone. Changing social hearts and minds is part of the task, but the role of the law and constitution is to supplement that process by taking all possible steps as urged by the CEDAW to ensure that girls and women have equal access to education as do men, to ensure that productive resources are subject to equitable processes as between men and women, that women's contributions are recognised and protected within and without marriage.

The legal approach is only a back drop, social attitudes will tend to prevail. However, if we focus on women and women's options in the long term women will have the means to negotiate or claim partnership with men.

None of these needs that women have ought to be classified as a direct attack on "maledom"; rather it seems to me that women want:-

Recognition, Partnership and Equity from men not conflict. No more, it might be suggested, than men want from each other.

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